

# **FAMILY LAW FOR THE 21<sup>ST</sup> CENTURY**

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## ***The face of the American family is changing.***

The average heterosexual marriage now lasts only 7 years.

There are more stepparent families than original families.

500,000 children are in foster care around the country, with 100,000 of those children awaiting adoptive homes.

It seems like only our imaginations (or lack of funds) limit the ways that children can be conceived with the help of assisted reproduction, primarily in vitro fertilization.

According to most recent CDC statistics, approximately 50,000 babies were born through in vitro fertilization throughout the country in 2004. Not surprisingly, the state with the highest in vitro rate was California.

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According to the 2000 Census, over 90,000 same-sex couples live in California. 46% of these couples are female.

Lesbian and gay couples in California are currently raising over 70,000 children, including over 16,000 adopted children. (With so many children in foster care, my opinion is that the only thing we should be saying to lesbians and gay men who want to adopt children is *thank you!*)

The Williams Institute in Los Angeles has recently estimated, based on census figures, that 3 out of 5 lesbians have or will have children, and 2 out of 5 gay men have or will have children, whether through birth or adoption.

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Children in large numbers are being raised by grandparents, by single parents, by unmarried parents, by lesbian and gay parents. Women are giving birth to babies conceived with donated eggs, with donated sperm, and even carried in donated wombs.

In the face of all these changes, we owe it to our children to take a long, hard look at what we mean when we talk about “parents” and “families.”

Figuring out who parents are is no longer just an issue of genetics. (Actually, I have to note that it’s only quite recently that we’ve known who fathers are with any true, genetic certainty. Up until recently, the determination of who to call a father was entirely a matter of public policy and not genetics.) In the current landscape, we have to look at a combination of genetics, intent to procreate, and also parental conduct in order to figure out who parents are.

I sit before you as a woman who has lived with my own, same-sex partner for almost 26 years. We own a home together in San Francisco and are raising two beautiful sons together. We work hard to support our family and contribute to our community.

I sit before you as a lawyer who, in my law practice, works with all kinds of “non-traditional” families with children. When I say “non-traditional” families with children, I mean by that all families where children are not being raised by their own biological parents – so I include single parent families, extended families, stepfamilies, same-sex families, adoptive families of all kinds, and heterosexual married couples who have conceived their children in non-traditional ways (such as through sperm or egg donation or via surrogacy). I seek to serve the full panorama of families that live in California.

In my work with the National Center for Lesbian Rights, I come into contact with cases from around the country where the parentage of children is being fought out in the courts. These are generally heartbreaking cases, particularly for the children involved.

So I have to take a moment to appreciate California.

California was one of the first states, back in the 1970’s, to adopt statutes to end illegitimacy. (Stop and think, for a moment, about the concept of “illegitimate” children.) But before 2005, children born to lesbian and gay couples had only one legal parent unless the birth parent’s partner adopted. Our children were still illegitimate.

In 2005 two things happened to change this: the Domestic Partner Rights & Responsibilities Act of 2003 (commonly referred to as AB 205) went into effect; and the California Supreme Court ruled on a trio of lesbian parentage cases, and in all three cases found that children conceived and born into intact lesbian homes had two legal mothers from birth, without adoptions.

The California Legislature is now in its second year of trying in a very serious way to make California the second state in the country to enact full

marriage equality, and our Supreme Court is currently considering the constitutionality of denying marriage rights to same-sex couples. I want to thank this body supporting marriage equality, and I honestly do so on behalf of the children of lesbian and gay families. As a lawyer, I can understand and appreciate the rights that committed lesbian and gay couples have been afforded through domestic partnership; but try explaining to my children that it is illegal for their parents to marry, but that domestic partnership somehow makes up for this. It just doesn't work.

California has made great strides to recognize and protect non-traditional families, and especially the children of non-traditional families. But there is much more to be done.

One of the main challenges that we grapple with in the family law world is California's failure to act to address the many uses of assisted reproductive technologies, and what they mean in terms of legal, parental rights. California is at the forefront of the medical world when it comes to assisted reproduction; yet the California Family Code barely addresses sperm donation, and never even mentions egg donation. The California Legislature has yet to seriously address the rules surrounding surrogacy.

For heterosexual couples, assisted reproduction and adoption are what they have to turn to when they encounter fertility issues; for lesbian and gay couples, assisted reproduction and adoption are *how we have children*. Currently, lesbian couples are forced to undergo the inconvenience and expense of using physicians or sperm banks to assist them with donor insemination whether or not there is any medical reason to do so – because if no doctor is used, the donor is legally a father. Article 7 of the 2002 Uniform Parentage Act provides substantially more protection than currently provided to CA singles and couples engaging in assisted reproduction. California should enact this Article.

The California Family Code currently provides only minimal guidance to people using assisted reproduction to conceive children. Family Code section 7613(a) provides that when a husband consents to his wife's insemination with donor sperm, the husband is treated as the "natural" father of the child. Section 7613(b) provides that when a man donates sperm to a physician or surgeon for purposes of artificial insemination of a woman other than the donor's wife, the donor is treated in law as if he *were not* the "natural" father of the child.

Again, no mention is made of egg donors.

In the current medical climate, where assisted reproductive technologies (ART) seem able to take us anywhere our imaginations would send us, the critical factor in determining legal parentage is rapidly shifting from genetics to intent. The most important question, in most ART cases, is *who intended to bring this child into the world with the intent to parent him/her?* The California

Family Code needs to be amended to recognize the ways that lesbians and gay men have children, and to bring intent into the equation.

To remedy this situation, I propose that California should adopt Articles 7 and 8 of the 2002 Uniform Parentage Act.

Article 7 addresses the legal status of children conceived through assisted reproduction. It addresses both sperm and egg donation in a very straightforward way. For example, section 702 provides:

***SECTION 702. PARENTAL STATUS OF DONOR. A donor is not a parent of a child conceived by means of assisted reproduction.***

By taking physicians out of the loop, this statute would reduce the complexity and expense for lesbian couples wishing to use donor insemination and would avoid the lengthy and emotionally wrenching legal battles between lesbian couples and their donors that sometimes result from the failure to locate or afford a physician to assist in the insemination process. This would particularly assist lower income lesbians.

Article 8 provides a clear legal framework for enforcement of surrogacy agreements, the primary method by which gay men procreate. Because of the legal, political and ethical complexity of surrogacy, this is a topic for another day.

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California owes it to our children to make sure that the laws change too.